PREMIER PRODUCTS CO. LTD. & ANOR

v.

ZAMRUD FIBRE INDUSTRIES (M) SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J.
[CIVIL SUIT NO.D5-22-1120-93]
26 AUGUST 1994

PATENT: Whether plaintiff was lawful owner of the Malaysian patent - Was the second plaintiff patent licencee of the first plaintiff - Was the plaintiff entitled to bring the action - Was the patent an invention of the plaintiff - Has the defendant infringed.

The second plaintiff is a company involved in the manufacture, retail and marketing of the first plaintiff's products in Malaysia since March 1989. The relevant patent application had been filed on 14 January 1989. The plaintiffs had entered into two agreements, one for the transfer of technology and the other for royalty payments.

A trap purchase made in December 1992 revealed that the defendants' product closely resembled the plaintiffs' in that it is made of fibreglass with related features like synthetic polystyrene material. The only slight difference was that the channel on top of the inner chamber had perforated holes whereas the plaintiffs' products had slotted holes and although the features were different, the function, namely to filter the water, was the same. All the features claimed in the Malaysian patent were well known before 1986.

Held:

[1] The first plaintiff is not the lawful owner of the Malaysian patent not being the inventor and not having acquired the legal rights to it as seen from the application for the Malaysian patent itself and especially since it is not clear whether the inventor was an employee of the first plaintiff. There is not a shred of evidence to prove that the inventor had assigned his rights to the first plaintiff to file the Malaysian patent.

[2] The Court is also not satisfied that the second plaintiff was a licencee of the first plaintiff assuming the latter is the owner of the Malaysia patent. The term "licence contract" in s. 41 of the Act must surely refer to the Malaysian patent for which a licence is granted. However, what has been produced is the transfer of technology agreement which makes no reference at all to the Malaysian patent but only to the transfer of technology, know-how and information, and the royalty agreement, which is defective for the same reasons.

[3] There is no evidence except for a letter dated 23 August 1993 from the first plaintiff authorising the second plaintiff to institute infringement proceedings which is not exactly in conformity with the provisions of the Act. In effect the licence cannot institute the proceedings and can do so only if the owner has failed to do so within three months of the licencee's request. In consequence, the second plaintiff in fact has no right to be a party to the action.

[4] It is evident that the first plaintiff's product was already in common use in Thailand four years prior to the patent application here. The first plaintiff in fact had no intention of filing a patent in Thailand thus only a design registration had been applied for there.

[Plaintiffs' claim dismissed. Defendants counterclaim allowed].

Cases referred to:

Bristol-Myers Company (Johnson's) Application [1975] RPC 127 ***(refd)***
*Carpenter and Another v. Smith (2) [1842] RR Vol. LX 736****(refd)***
*In the matter of Taylor's Patent [1896] RPC 482****(refd)***
*David Stead v. George Anderson [1847] RR Vol. LXXII 730****(refd)***
*British Celanese Ld. v. Courtalds Ld. [1933] RPC 259****(refd)***
*Hills v. Evans [1862] Ch. Vol. 31 457****(refd)***
*C. Van Der Lely N.V. v. Bamfords Limited [1963] RPC 61****(refd)***
*Chapman and Cook, and Lectro Linx, Ld. v. Deltavis, Ld. [1930] RPC 163****(refd)***
*Harris v. Rothwell [1887] RPC 225****(refd)***
*Allmanna Svenska Elektriska A/B v. The Burntisland Shipbuilding Coy. Ld. [1952] RPC 63****(refd)***
*Savage v. D.B. Harris and Sons [1896] RPC 364****(refd)***
*Woodrow v. Long Humpreys & Co. Ld. [1933] RPC 25****(refd)***
*Non-drip Measure Company, Ld. v. Strangers, Ld. and F.W. Wolworth & Co., Ld. [1942] RPC1****(refd)***
*Beecham Group Limited (Amoxycillin) Application [1980] RPC 261****(refd)***
*Williams v. Nye [1887] RPC 62****(refd)***
*Organon Laboratories Ltd.'s Application [1961] RPC 119****(refd)***
*Raleigh Cycle Co., Ltd. and Another v. H. Miller & Co., Ltd. [1948] AER 308****(refd)***
*Brooks v. Steele and Currie [1897] RPC 46****(refd)***
*Electric & Musical Industries Ld. and Boonton Research Corporation Ld. v. Lissen Ld. and Another [1938] RPC 367****(refd)***
*Rodi and Wienenberger A.G. v. Henry Showell Limited [1969] RPC 378****(refd)***
*Rondo Company Ld. v. The Gramophone Company Ld. [1929] RPC 378****(refd)***
*Gadd and Mason v. The Mayor & Co., of Manchester [1892] RPC 516****(refd)***
*Marie Louise Killick v. Pye Ld. [1958] RPC 366****(refd)***
*Vickers, Sons and Co., Limited v. Siddell [1890] RPC 292****(refd)***
*Technograph Printed Circuits Limited v. Mills & Rockley (Electronic) Limited [1972] RPC 346****(refd)***
*Nokes v. Doncaster Amalgamated Collieries, Ltd. [1940] 3 AER 549****(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 15 r. 6, O. 18 r. 19
Patents Act 1983 ss. 11, 14, 15, 23, 18(2), 56, (2)(d), 59, (1), 61, (2)

For the plaintiffs - S. Jayakar; M/s. Shearn Delamore & Co.
For the defendants - P. Kandiah; M/s. Lee Ong & Kandiah

JUDGMENT

Haji Abdul Malek bin Haji Ahmad J:

By summons in chambers filed on 6 October 1993 upon a certificate of urgency, the plaintiffs had applied for an order that the defendants whether by themselves, their officers, servants or agents or any of them be restrained forthwith, until trial or further order, from manufacturing septic anaerobic filter tanks made in accordance with the specification and containing the features identified in the claims of the Malaysian patent MY-102409-A and/or importing, exporting,

selling, offering for sale, stocking, distributing septic anaerobic filter tanks under the trade brand "ZATS, Anaerobic Filter Tanks" or otherwise referred to as "Zamrod Anaerobic Filter Tanks" identified as models ZATS 1900 and ZATS 2900 or under any other trade brand or model of the defendants, or enabling, assisting or causing others to do any of the acts hereinbefore set out, such further and other relief as may be deemed just in the circumstances and costs in the cause.

By summons in chambers filed on 5 November 1993, the defendants had prayed for the following:

(a) an order pursuant to O. 15 r. 6 of the Rules of the High Court 1980 (hereinafter "the Rules") that the second plaintiff to cease to be a party;

(b) an order that the plaintiffs' statement of claim be struck out and the plaintiffs' action against the second defendant be dismissed under O. 18 r. 19 of the Rules and/or under the inherent jurisdiction of the Court on the ground that the same-

(i) discloses no reasonable cause of action against the second defendant;

(ii) is scandalous, frivolous or vexatious; or

(iii) is an abuse of the process of the Court;

(c) costs of the action and costs of the application be paid by the plaintiffs to the second defendant.

When the parties came before me on 16 December 1993, they had agreed that the defendants' application be heard first and after hearing arguments from both sides, I had on 12 January 1994 held that all the parties named in the action were involved in the matter and had dismissed the said application with costs. On that same day, I had heard the plaintiffs' application for the injuction and after considering the submission of learned Counsel for both parties, I had ruled on 7 February 1994 that the balance of convenience was in favour of the defendants and had refused to grant the injuction.The said application was therefore dismissed with costs. I had, however, ordered an early trial of the matter.

At the trial before me, the plaintiff had called four witnesses and the defendants three. The first witness for the plaintiff Dr. Robiatun Aduwiyah binti Jamaluddin was the medical officer of the Pahang State Medical Department and she told the Court that when she was the District Health Officer in 1991 and 1992, she had had occasion to order the renovation of sewerage works at the District Health Centre. She said that the work had progressed in the normal way under the supervision of the public works department. However, she had subsequently received complaints of two of the nine units giving way during installation. Another two units also gave way and all four were replaced by the second defendant. The contractor had in fact earlier agreed to buy the nine units from the second defendant. She added that although at the site meeting on 6 June it had been agreed that the supersept SS-2 models of the second plaintiff were to be used, the second defendant had supplied the Zats-2900 models. After all the nine units had been installed, she said that she had written to the second defendant on 22nd September 1992 to tell him that there had been no complaints. Under cross-examination, she testified that the problems encountered were,

according to the contractor, related to the method of installation and had nothing to do with the designs of the models.

The second witness for the plaintiff Michael Tan Teck Siong was the manager of office operations of Pinkerton Singapore, a private investigation company owned by Pinkerton America. He had been assigned to investigate a septic tank purchase and had travelled to Kuantan on 22 December 1992 to make the said purchase from the first defendant. He had met the first defendant's representative on the following day and had bought the Zats 1900 model for RM1500 after having got a discount from the quoted price of RM1800.

The plaintiffs' third witness Kamarul Ariffin Haji Nordin was the second plaintiff's sales manager of its sales executive division which was in charge of all government projects nationwide. He had been told at a meeting in December 1991 that a number of septic tanks had collapsed at the district health centre which units were supposed to have been provided by them. At that time, he said, the first defendant was their agent but he knew from the model numbers that the collapsed septic tanks were not their products. In fact, he had been called to replace the septic tanks because the engineer was under impression that they were the ones who had supplied them.

The senior general manager of the second plaintiff Dennis Ch'ng Siok Eik was the fourth witness and he gave evidence that the second plaintiff was a trading company in sewerage treatment systems but had developed into a manufacturer and supplier of prefabricated sewerage systems. They had contacted the first plaintiff in Bangkok who were dealing in similar products. The second plaintiff had been the licencee for the first plaintiff for the manufacture, retail and marketing of the first plaintiff's products in Malaysia since March 1989. The relevant patent application, he added, had been filed on 14 January 1988. He further testified that the plaintiffs had entered into two agreements, one for the transfer of technology and the other for royalty payments. Royalty was agreed at five per cent for the first five years and three per cent for the second five years based on the factory price.

The said witness, who holds a Diploma in Civil Engineering and has substantial experience in engineering work particularly in sewerage and piping works, had started as an employee of the public works department in Sarawak in 1970 and for five years was involved in infrastructure work for all Sarawak army camps. He had been exposed to all types of sewerage equipment.

As for the patent application, he said the units were made of fibreglass with two chambers. The outer chamber is called a separation tank to separate the solids from the liquids. The inner chamber is called the anaerobic filter chamber and is connected with the outer chamber by means of a port situated at the bottom to facilitate the flow of liquid from the sewerage by means of the upward filter. The inner chamber is filed with porous polystyrene which research had shown to be more effective than stones and gravel which had been used previously.

The witness had continued by saying that their products were selling well in Malaysia. The second defendant, who was their employee from 1988 to 1990, had had his service terminated. The second defendant had requested to be appointed as agent after the termination and the second plaintiff had acceded to that

request. According to this witness, it was while the second defendant was in their employ that the was exposed to the technical know-how of the plaintiffs' models being their divisional sales manager. And it was because he had infringed the patent, which was discovered as a result of the district health centre incident, was his agency terminated on 28 September 1992. The witness insisted that on examination of both the plaintiffs' and the defendants' products following the trap purchase in December 1992 he had found that the defendants' product closely resembled the plaintiffs' in that it is made of fibreglass with related features like synthetic polystyrene material. The only slight difference, he added was that the channel on top of the inner chamber had perforated holes whereas their product had slotted holes and although the features were different, the function, namely to filter the water, was the same.

He was cross-examined at great length and gave evidence that he had worked with the first plaintiff and had visited their premises in Bangkok although in the last three years the visits were less regular. He said he was familiar with the technological capabilities of the first plaintiff and their range of products under different names. He agreed that before signing the agreements in March 1989, anyone in Malaysia could have imported the first plaintiff's products. He later said he could not recall anyone in Kedah, where his premises were, importing the first plaintiff's products before that date.

He further stated that he had got the approval on 27 October 1987 from the technical committee from five Ministries under the letterhead of the Ministry of Housing and Local Government after submitting the concept of prefabricated sewerage systems with all technical details required including the shape and design. When they aplied for approval, he said, they were not the licencee of the first plaintiff but had done so as agent. They had entered into the technology transfer agreement only after getting the approval.

After the approval, they had imported the units initially from the first plaintiff but had advised them to apply for the patent in Malaysia. Consequently, both the plaintiffs had given instructions to the patent agent on 25 November 1987 and the patent was filed on 14 January 1988. The witness went on to say that the inventor of the product was Dr. Kasemsunt Suwanrat (hereinafter "the inventor") but he was not sure if he was an employee of the first plaintiff. When he was asked if the inventor was employed by the Bangkok Metropolitan Office Planning Department, the witness was not too sure. Neither could he say whether a civil servant could produce a commercial model as he was not familiar with Thai laws. He agreed that the inventor had applied for the Thai patent on 5 September 1986. He than proceeded to explain the features claimed in the Malaysian patent application.

When questioned about the delivery of a similar septic tank to Keen Design Company on 19 June 1986 by the first plaintiff, the witness confirmed the sale at 19,500 baht but said that it was not a normal transaction as there was no signature on delivery and no conditions for payment on the invoice.

The defendants' first witness Dr. Azni bin Idris is the senior lecturer at the Universiti Pertanian Malaysia who had graduated from the University of Birmingham in 1980, worked for one year, did his Masters at the University of Leeds in 1982 in Environmental Pollution Control and pursued his Ph.D. in

Environmental Engineering at the University of Newcastle-on-Tyne which he obtained in 1989. His area of specialisation was environment and waste since 1981 namely in sewerage and industrial waste water treatment and was doing work on environmental pollution, and on treatment, design and monitoring for both municipal waste water and for industrial waste in the government and private sectors.

He had presented more than twenty five papers on the anaeorbic biofilter system both locally and internationally and at the University he was teaching third year degree course students in civil engineering waste water treatment processes and chemical technology. The sewage research, he had added, goes back more than a hundred years.

He told the Court that the biofilter is a column or casing or multicompartment body that contains media which is resistant to corrosive attack. The anaerobic filter was tested in pilot studies in 1969 and the first persons to do it was Boulter in 1957. He had explained that he had remembered that because it was his birth year. The first full scale commercial unit came out in the United States in 1973. For domestic use, he said, the two most important criteria is it must be compact, small enough to be placed within the house perimeter at the back or at the side but not in front. The material must be special, not too bulky and the preferable and most popular supplied tank was vertical. He added that the media must be well positioned in the chamber for good treatment or flow and he personally would go for synthetic plastic material like PVC, polystyrene, polypropolene and HDP.

He explained that people traditionally use stones or gravel but this could not be supported in the vertical system. The shift of media had started in the early seventies and the series of studies conducted on its use and performance had been well documented and would have been common knowledge to people involved in this field including himself. There were also published works on the subject in journals which rated highly at the many seminars the witness had attended.

He continued by stating that sewage had a lot of solid organic matter and to assess pollution, it must be treated. The approach is to remove the solids by trapping them in the scum removal chamber. Water containing suspended particles need to enter another chamber called the settling zone. The sludge is settled at the bottom but the water needs to pass the biofilter zone where inert media is positioned. After passing the filter zone, it is discharged into the drain away from the treatment compartment.

Under cross-examination, he said that the development of finding new biomedia had gone through a number of years and the objective was to find which is the best and cost saving. Based on his academic stand, he found a lot of potential in the use of PVC, HDP, polystyrene and polypropolene. He had insisted that the claims in the Malaysian patent were not new based on the literature he had made comparisons to and material he had been made aware of from his research and studies. On being questioned by the Court, he maintained that he was giving evidence as an academician and professional engineer and not as a friend of the second defendant.

The next witness Dr. Mohd. Azraai Kassim is the head of the Department of Environmental Engineering at the University Teknologi Malaysia in Skudai who gave evidence that he had obtained his BSc. in Civil Engineering from the University of Manchester in 1981. Thereafter in 1983 he had obtained his Masters in Public Health Engineering from the same university. In 1992, he had obtained his Ph.D in Environmental Engineering from the University of Newcastle-on-Tyne.

His area of specialisation is biomedia in anaerobic treatment and brewery waste water. He had presented conference papers on environmental pollution control in 1992 and on anaerobic fluidized reactors in 1993. At the present time, he was lecturing to final year students and was doing research work on various aspects of sewage treatment.

He told the Court that his work on domestic treatment began in 1991 when he designed the conventional treatment plant for Glossops in Derbyshire, England. He had done performance studies in sewage treatment systems in Malaysia beginning with septic tanks in 1986, and oxidation ponds and aerated lagoons in 1988. He had been doing consultancy work for the first defendant in 1993, Syarikat T.C.Y. for precast septic tanks also in 1993 and Anfilco tank systems in early 1994.

The witness then went on to deal with the subject of composite sewage treatment. What was needed, he said, was a compartment with two chambers, one for sedimentation and partial anaerobic digestion and the other for the filter. By treatment, the pollutant is reduced to the acceptable level to meet the standards of the Environment Department. There are two stages to the anaerobic reaction. Firstly, the organic matter in the way is acted upon acid forming bacteria to form volatile fatty acids and new bacteria. Secondly the volatile fatty acids are acted upon by methane forming bacteria to form methane gas, waste, carbon dioxide, hydrogen sulphide and new bacteria.

He reiterated that this technology was about a hundred years old. He stressed that the anaerobic filter system, upflow anaerobic sludge blanket system and the upflow anaerobic fluidized system had developed since the seventies. When shown the relevant diagrams in the agreed literature produced, he emphasised that this was an obvious fundamental principle and it was a natural progression since 1973 to replace sand, gravel or broken stones as media as the volume ratio was small compared to synthetic material. This was evident by studies made by Shaucksmith in 1973 at the University of Newcastle-on Tyne which had been doucumented and published in journals.

He maintained that an average person with engineering skills would be able to design the septic tank system without extensive research in view of the wealth of literature available. All the features claimed in the Malaysian patent, he said, were well known before 1986 as can be seen from the Imhoff tank system which was already in existence in 1949. Otherwise, all the other features were basic and obvious. He agreed under cross-examination that he had subjected the defendants' products to tests to determine efficiency.

The third witness for the defendants was the second defendant himself who stated that his qualifications and work experience were a certificate in civil

engineering from the Politeknik Ungku Omar, Ipoh in 1983, Diploma in Civil Engineering from Ssangyyong Institute of Technology, Korea in 1984, a year as technical assistant at the Kuantan Port Authority, a degree in science engineering from the University of Aberdeen, Scotland in 1988 and from November 1988 to August 1990 he was divisional manager for the second plaintiff based in Kuala Lumpur. After that he had been executive director of the first defendant.

He testified that while with the second plaintiff he was wholly in sales promotion and marketing for the East Coast and the southern part of the peninsula. He was given in-house technical training but insisted that he was never employed in the second plaintiff's factory which was set up in April 1990 and was never involved in the manufacture and design of the factory and its machines. He maintained that he had been taught the basic principles of septic tanks and treatment plants during his studies. He had also acquired the technology of fibreglass reinforced plastic manufactring for septic tanks with the assistance of the Standard and Industrial Research Institute Malaysia sponsored by a grant from the Industial Technology Assistance Fund granted by the Ministry of International Trade and Industry. He had started production of the septic tank in March 1992 and the design was based on his studies, assistance from his second witness and reference to relevant books.

He said that the difference between the products manufactured by the plaintiffs and the defendants were the model number, capacity, shape, size, upward flow port and filter chamber. He added that Hume Industries had manufactured a similar septic tank in the early seventies. As for his products, he said that he had obtained the approval of the technical committee of the Ministry of Housing and and Local Government before they were marketed. As for the Malaysian patent, he stressed that none of the characteristics claimed were totally new as they were common features. Under cross examination, he said that while working with the second plaintiff he was briefed only on working mechanisms and not on the construction of the systems.

In his written submissions, learned Counsel for the defendants had contended that there are basically four issues before the Court. The first is whether upon a balance of probabilities, the defendants had proved that the first plaintiff is not the lawful owner of the Malaysian patent pursuant to s. 56(2)(d) of the Patents Act 1983 (hereinafter "the Act").

Secondly, has the second plaintiff proved that it is a patent licencee of the first plaintiff entitling it to bring patent infringement proceedings. Assuming that the second plaintiff is a patent licencee, the next question is has it proved that all legal requirements have been satisfied before instituting patent infringement proceedings and that it is entitled under the licence agreement to institute the action.

Thirdly, whether the defendants have upon a balance of probabilities proved that what is claimed as an invention in the Malaysian patent is not patentable because it does not comply with the requirements of ss. 11, 14, 15 and 23 of the Act. Fourthly, have the plaintiffs proved infringement in the event the Court finds the Malaysian patent valid.

He went on to argue that the evidence adduced at the trial showed that the first plaintiff is not the lawful owner of the Malaysian patent as he has not acquired

any legal rights from the inventor giving it the right for patent rights in Malaysia. This is because s. 18(2)of the Act clearly provides that the rights to a patent shall belong to the inventor. Section 56(2)(d)of the Act has stated that -

(2) The Court shall invalidate the patent if the person requesting the invalidation proves -

(a) xxx

(b) xxx

(c) xxx

(d) that the right to the patent does not belong to the persons to whom the patent was granted;

(e) xxx

Section 56(2A) of the Act has qualified the position by stating that "Notwithstanding subsection (2), the Court shall not invalidate the patent on the ground mentioned in paragraph (d) of subsection (2) it the patent has been assigned to the person to whom the right to the patent belongs" but it is the contention of the defendants that there has been no evidence of any assignment from the inventor to the first plaintiff. In fact, the plaintiffs could not even confirm where the inventor was working.

Learned Counsel for the defendants had furher maintained that the relevant document relied upon by the plaintiffs namely P12 was merely a document evidencing the transfer of the design application and registration to the first plaintiff with regards to ownership rights in Thailand but there has been no evidence whatsoever to prove that the inventor had assigned his rights to file a patent application in Malaysia to the first plaintiff. In any case, the date in P12 is 9 August 1989 which is long after the Malaysian patent application was filed on 14 January 1988.

For the second issue, the plaintiffs had relied on the technology transfer agreement (P4) and the royalty agreement (P5) entered into between the first and the second plaintiffs on 27 March 1989. Learned Counsel for the defendants had reiterated that although the agreements referred to the use of technology, know-how and information in producing sewage anaerobic filter systems for sale and distribution in Malaysia and the payment of royalties therefor, they had not specifically referred to the Malaysian patent which had been filed fourteen months earlier. He argued that a distinction had to be drawn between a licence for a process technology, which was what P4 and P5 were about, and a licence to a patented product.

Learned Counsel for the defendants had also submitted that the first plaintiff never had the intention to file a patent application in Malaysia in the first place. It was the second plaintiff on their own initiative which had instructed S.Y. Chew & Partners to do so. Now, even assuming that the second plaintiff is a licencee, learned Counsel had said that it is the primary responsibility of the first plaintiff as patent owner to bring the patent infringement proceedings as s. 59(1) of the Act states that "The owner of the patent shall have the right to institute Court proceedings against any person who has infringed or is infringing the patent". The second plaintiff as licencee, he added, can only institute Court

proceedings if the owner of the patent had refused or failed to do so within three months of the request from the licencee under s. 61 of the Act. Consequently, he said the second plaintiff had no *locus standi* to institute these proceedings.

The third issue is the learned Counsel for the defendants' contention that the Malaysian patent is invalid on the grounds that the invention is not patentable as it is not new and does not involve an inventive step. Section 11 of the Act states that an invention is patentable if it is new, involves an inventive step and is industrially applicable. Section 14 of the Act clarifies that an invention is new if it is not anticipated by prior art which shall consist of everything disclosed to the public, anywhere in the world, by written application, by oral disclosure, by use or in any other way, prior to the filing date of the patent application claiming the invention or the contents of a domestic patent application having an earlier priority date than the patent application referred to earlier to the extent that the contents are included in the patent granted on the basis of the said domestic patent application.

An oral disclosure shall be disregarded if such disclosure occurred with one year preceding the date of the patent application and if such disclosure was by reason or in consequence of acts committed by the applicant or his predecessor in title, if such disclosure occurred within one year preceding the date of the patent application and if such disclosure was by reason or in consequence of any abuse of the rights of the applicant or his predecessor in title or if such disclosure is by way of a pending application to register the patent in the United Kingdom patent office as at the date of coming into force of the Act.

It is relevant at this stage to reproduce the claims defining the invention and they are:

1. A septic anaerobic filter tank for on-site composite sewage treatment and filtration, having an outer casing which defines a separation chamber, an inlet for waste inluding water and excreta, and an outlet through which the fluid obtained after treatment flows out of the tank;

   characterised by:

   means defining a separate smaller chamber within said outer casing;

   at least one upflow port through which fluid organic waste flows up from said separation chamber into and through said separate smaller chamber and thence out through said outlet;

   biomedia, consisting of synthetic porous polystyrene or other biochemically and chemically durable material, disposed within said separate smaller chamber to filter said fluid organic waste flowing upwardly therethrough; and

   a scum and sludge trapping device positioned to receive said waste from said inlet, to trap non-decomposable matter contained in said waste for removal from time to time, and to pass only degradable waste to said separation chamber.

2. A septic anaerobic filter tank according to claim 1 further comprising a receiving trough arranged to receive treated waste water which has passed through the separate smaller chamber and to pass it to the outlet.

3. A septic anaerobic filter tank according to claim 1 or claim 2 wherein the separate smaller chamber is positioned centrally of the separation chamber and adjacent an (on) upper wall of the tank.

4. A septic anaerobic filter tank according to any one of the preceding claims wherein the upflow port(s) is positioned in a bottom wall surface of the smaller chamber.

5. A septic anaerobic filter tank according to any one of the preceding claims wherein there are three upflow ports.

6. A septic anaerobic filter tank according to any one of the preceding claims wherein the biomedia is free to float within the smaller chamber.

7. A septic anaerobic filter tank substantially as herinbefore described with reference to the accompanying drawings.

Having carefully considered the testimony of the witnesses for both the plaintiffs and the defendants, the somewhat lengthy written submissions of learned Counsel for both sides, the case authorities, the agreed bundles of documents including the relevant literature pertaining to the subject and the claims defining the invention, it is my finding that the anaerobic sewage treatment system was already well known and obvious well before the filing of the application for this patent.

It is also my finding that the first plaintiff is not the lawful owner of the Malaysian patent not being the inventor and not having acquired the legal rights to it as seen from the application for the Malaysian patent itself and especially since it is not clear whether the inventor was an employee of the first plaintiff.

The plaintiffs had only produced P12 which is a document evidencing the transfer of the design application to the first plaintiff with regards to ownership of design rights in Thailand. There is, however, not a shred of evidence to prove that the inventor had assigned his rights to the first plaintiff to file the Malaysian patent. Further, even if the Court is in error on this point, P12 is dated 9 August 1989 which is well after the filing date of the Malaysian patent on 14 January 1988.

The Court is also not satisfied that the second plaintiff was a licencee of the first plaintiff assuming the latter is the owner of the Malaysian patent. The term "licence contract" in s. 41 of the Act must surely refer to the Malaysian patent for which a licence is granted. However, what has been produced is the transfer of technology agreement (P4), which makes no reference at all to the Malaysian patent but only to the transfer of technology, know-how and information, and the royalty agreement (P5), which is defective for the same reasons, considering the fact that both P4 and P5 were entered into some fourteen months after the Malaysian patent was filed.

It is quite clear under s. 59(1) of the Act that it is the owner of the patent who shall have the right to institute Court proceedings for infringement but a licencee may, under s. 61(2) of the Act, request the owner of the patent to do so. Only if the owner had refused the request or failed to institute the proceedings within three months from the receipt of the request, as provided in s. 61(3) of the Act, can the licencee institute the proceedings in his own name after notifying

the owner but the owner shall have the right to join in the proceedings. There is no evidence here that any of these steps had taken place except for a letter dated 23 August 1993 from the first plaintiff authorising the second plaintiff to institute infringement proceedings which is not exactly in conformity with the provisions of the Act. In effect the licencee cannot institute the proceedings and can do so only if the owner has failed to do so within three months of the licencee's request. In consequence, the second plaintiff in fact has no right to be a party to the action.

As for the claims defining the invention, the diagram of the upflow anaerobic filter at page 25 of the agreed bundle of documents which is from Raman and Khan published in 1978, and the one at page 114 of the same bundle which is from page 609 of Metcalf and Eddy, Inc.'s Waste Water Engineering published in 1972, has all the features stated in the first claim and this was well before the filing date of this patent. In fact, the second plaintiff's Senior General Manager had even gone on to say that a similar product with features of the first claim had been earlier produced by Pollution Engineering Sdn. Bhd.

In his own paper, the inventor had at page 73 of the agreed bundle stated that "the septic tank port of the supersept is a standard set-up which is well-known. The design parameter from various text-books can be applied. The anaerobic filter part of the supersept employs the same principle of the upflow anaerobic filter as found in the literature ....." and at page 75 he had said that "most anaerobic filters as reported in the literatures use stones or gravel, some use syntetic media". These are clear admissions that anaerobic filters are not new.

The inventor's comments in his paper also indicate that none of the features claimed are novel except for the biomedia used namely polystyrene but the defendants had shown through D14 and D15 that that feature too is not exactly new. D14 is an article entitled "Anaerobic Digestion of the High Strength Industrial Wastewaters" by G.K. Anderson published in 1977 where at page 69 it has been stated that limited studies carried out had been encouraging as regards the use of polystyrene as biomedia in anaerobic filters. D15 is an article by P. Huysman in 1983 and it had concluded that polyurethane foam is suitable as biomedia at page 645. It cannot therefore be said that the inventor was the first to use polystyrene as biomedia for anaerobic filters.

From the testimony, it is also evident that the first plaintiff's product was already in common use in Thailand four years prior to the patent application here. The first plaintiff infact had no intention of filing a patent in Thailand thus only a design registration had been applied for there. As conceded by the plaintiffs' witness, any party could have imported and used the product in Malaysia at that stage in time. It was the second plaintiff who had found that the sales potential of the first plaintiff's products good in Malaysia which had made them decide to file the patent application here. As the filing was done by a professional patent agent, it surely cannot be an oversight not to claim for the one year prior disclosure exemption. In fact, it is possible that they may be even trying to mislead the authorities.

This defect in the plaintiffs' case is further highlighted by the publication of the progress reports of effluent quality of package sewage anaerobic filter study by the Thai Environmental Engineers Association in June 1987 which confirmed

that the first plaintiff's product was the same as the one for which the Malaysian patent was filed and that the installation date was 1 October 1986. In the present case, any public disclosure or use prior to 14 January 1987 would be fatal to the validity of the patent by virtue of s. 14(3)(a) of the Act. As for the admissibility of D10, which is the sale invoice by the first plaintiff to Keen Design Company in Thailand, it is the Court's view that it can be admitted as secondary evidence as the original should be with the first plaintiff who had failed to produce it despite the earlier notice given by the defendants to do so.

The defendants had also called witnesses to state that the subject of sewage treatment is itself more than, a hundred years old and that the anaerobic filter systems were already commercially tested in the fifties and the sixties followed by studies on biofilter technology in the seventies. These are all well documented in leading journals in the field of technology and the subject in fact had ben taught to university students doing the basic civil engineering course. Consequently, a man skilled in the art could be expected to have at least a basic degree in civil engineering, a good working knowlegde of sewage treatment systems and have read or had had access to the basic textbooks and leading technical journals on the subject. It cannot be disputed too that the concepts of preliminary sedimentation of sewage and its anaerobic treatment in a closed tank, filtration, the use of two compartments and the use of biomedia are basic. Infact it had been agreed by the witnesses for both the plaintiffs and the defendants that the features claimed in his Malaysian patent are obvious to a person skilled in the art. This must be the very reason why the inventor did not apply for a patent in Thailand and had only opted to apply for the design registration there.

As submitted by learned Counsel for the defendants, only a person devoid of any technical knowledge would attempt to place the anaerobic chamber outside the separation chamber, not provide an upflow port or opening for the inflow of liquid into the smaller anaerobic chamber, not provide a scum and sludge trapping device to trap non-biodegradable matter or place a device in any other part of the product, not provide any biomedia, and place the upflow port in any other portion of the smaller chamber or separation chamber.

All factors having been carefully considered, I could only conclude that the plaintiffs' claim ought to be dismissed with cost which I so ordered. On the same grounds, I had allowed the defendants' counterclaim but had ordered that each party bear their own costs.